No. 17-961

In The Supreme Court of the United States

THEODORE H. FRANK AND
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CIVIL JUSTICE RESEARCH INITIATIVE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF *AMICUS CURIAE*[1]

The **Civil Justice Research Initiative** (CJRI) is a joint think tank of Berkeley Law School and the UC Irvine School of Law. CJRI's mission is to systematically identify and produce highly credible, unbiased research on critical issues concerning the civil justice system, including expanding access to justice. Research of CJRI focuses on the growing limits on access to the courts, including inadequate funding of state and federal courts, increased use of compulsory arbitration clauses, and restrictions on class-action lawsuits. The Initiative also examines potential remedies to help level the playing field between well-funded and poorer litigants. The ultimate aim of CJRI is to help ensure that leaders, legislators and courts have the research and data they need to set policy that will ensure continued access to the courts.

CJRI appears before the court as an *amicus curiae* in support of Respondents. Given that the institution of *cy pres* has become critical for the ability of those separated from the legal system to gain access to justice through non-profits and legal service organizations, CJRI believes that it has an obligation to highlight the benefits of *cy pres*, while correcting inaccurate statements about *cy pres* that have unfortunately emerged as a part of current legal discourse.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

When class actions resolve, it is common for some or even all funds paid to the class to remain undistributed. This is generally due to an inability to locate all class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, the economic infeasibility of class distribution. Over time, the distribution of these funds through the mechanism of *cy pres* has become thoroughly enmeshed in the fabric of American jurisprudence. The American Law Institute has published guidelines for such distribution, *cy pres* has been used within all federal circuits, 23 states and Puerto Rico either have Supreme Court rules or legislative enactments authorizing *cy pres*, another 17 states have judicially approved of its use, and the U.S. Congress has provided for *cy pres* as part of the Class Action Fairness Act. Thus, throughout American jurisprudence, *cy pres* is now acknowledged as a proper tool to further the goal of class actions in advancing justice, while being consistent with state, federal, and Constitutional law.

Yet, despite this now four decades-old use of *cy pres*, and its endorsement by every circuit and virtually every state to consider the doctrine, Petitioners and several *amici* raise certain constitutional, legislative, and administrative challenges to its very existence in the class action context. Generally, these challenges ignore the fact that Congress has enacted Rule 23, approving of the aggregation of private causes of action in class actions and allowing plaintiffs to

recover damages on a collective basis. Many of the provisions of Rule 23, such as notice, the right to opt out and not become a member of the class, and the necessity of a fairness hearing for any settlement to be approved, are safeguards that vitiate the constitutional and other concerns raised. Structural and legislative concerns, such as those regarding the Rules Enabling Act and numerous alleged conflicts, are already addressed through the extensive administrative requirements Congress has enacted as part of Rule 23.

For the most part, the complaints ignore the vital role of the courts in evaluating all aspects of a settlement, including *cy pres*, which requires judicial approval before any proposed distribution can occur. While there are, as always, a few outliers, overall, courts throughout the judiciary closely scrutinize class action settlements along with the distribution of *cy pres* pursuant to their Congressionally-mandated administrative function of evaluating and approving all aspects of class settlements. Indeed, through amended Rule 23(e)(2)(C)(ii) (effective Dec. 1, 2018), Congress will soon be requiring that courts expressly consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

To the extent that this Court believes that courts below need further guidance, CJRI suggests certain guidelines. First, *cy pres* awards should not be used when the settlement funds can be effectively and fairly distributed to class members. Second, settlement money should not revert to a defendant, because that would undermine the deterrent function of class

actions. Third, instead, residual settlement money should be distributed in a way that would indirectly benefit the class, furthering the purpose of the lawsuit "as nearly as possible" through judicial consideration of the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class. Fourth, as the custodians of the class settlement, it should be the class representatives and class counsel who select proposed *cy pres* recipients, subject to review and approval by the court. Fifth, organizations with broad access to justice missions and those that help legally underserved populations are appropriate *cy pres* recipients, because the underlying purpose of class actions is to provide access to justice for class members who otherwise would have no recourse against those who have wronged them. Finally, if settlement funds cannot be economically distributed, "*cy pres* only" settlements should be allowed. From the perspective of the aggrieved there is no worse result than the wrongdoer getting off "scot-free."

ARGUMENT

I. The Concept of *Cy Pres* Is Ensconced in American Jurisprudence

The *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable

trusts when a gift is specified to go to a charitable entity that either no longer exists at the time of the bequest, has become infeasible to distribute to, or whose receipt of funds would be in contravention of public policy. Over time, most courts and now 48 states have institutionalized this elegant solution of transferring these funds to the next best charitable or public interest use in a way that would satisfy "as nearly as possible" the trust settlor's original beneficent intent.

With the advent of class actions, another source of funds has emerged whose allocation has at times proven to be infeasible to distribute. It is universally recognized that there are times when class action settlements cannot be fully distributed due to an inability to locate absent class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed." Principles of the Law of Aggregate Litigation §3.07 cmt. a (2010) ("ALI Principles"); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §11:20 (4th ed. 2012) ("Newberg"). *See* Brief of Petitioner ("Pet.") 6.

As procedures involved in class action litigation have matured, it has come to be accepted in federal courts that when cases are resolved and excess funds remain, those funds will be distributed in the form of *cy pres*. Examples within every Circuit can be found where a *cy pres* distribution has been approved: 1) the

First Circuit's *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,33-36 (1st Cir.2009) (holding trial court didn't abuse discretion in approving settlement that distributed excess funds for cancer research or patient care); 2) the Second Circuit's *In re Holocaust Victim Assets Litig.*, 424 F.3d 132,146 (2d Cir.2005) (distribution to the neediest class members); 3) the Third Circuit's *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163,172-175 (3d Cir.2013) (approved "for a purpose related to the class injury"); 4) the Fourth Circuit's *Jones v. Dancel*, 792 F.3d 395,406, n.6 (4th Cir.2015) (because it was not practical to distribute *de minimis* amounts to the class, the arbitrator ruled that those damages be distributed in equal portions to two *cy pres* recipients, the National Consumer Law Center and the National Association of Consumer Advocates); 5) the Fifth Circuit's *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468,475 (5th Cir.2011) (permissible when either: (1) infeasible to distribute additional settlement funds to class members; or (2) claimants have been fully compensated and further distribution would be a windfall); 6) the Sixth Circuit's *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621,625 (N.D. Ohio 2016) (approving award to the Family House Toledo); 7) the Seventh Circuit's *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494,502 (7th Cir.1989) (recognizing the court's broad discretion); 8) the Eighth Circuit's *Powell v. Ga. Pac. Corp.*, 119 F.3d 703,706-707 (8th Cir.1997) (approval of minority student scholarship program where most class members lived); 9) the Ninth Circuit's *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,1129 (9th Cir.2017) (recognizing "courts have

long employed *cy pres* remedies when some or even all potential claimants cannot be identified"); 10) the Tenth Circuit's *Tennille v. W. Union Co.*, 809 F.3d 555,563 (10th Cir.2015); 11) the Eleventh Circuit's *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. Appx. 429,435, 2012 WL 2947212 (11th Cir. July 20, 2012) (an unpublished decision,[2] affirming a settlement with *cy pres* distribution when class members received "full compensation" under the terms of the settlement); and 12) the D.C. Circuit's *Keepseagle v. Perdue*, 856 F.3d 1039,1043 (D.C. Cir.2017).

Cy pres distributions are widely used after the settlement of state court class actions. In fact, in 23 states (and Puerto Rico), state supreme courts or legislatures have adopted specific rules or statutes that authorize *cy pres*, including to charitable entities that promote access to legal services for low-income individuals. Meanwhile, *cy pres* distributions have also been approved by courts in at least 17 other states where state Supreme Court rules or statutes have not been set forth. (*See* Appendix "A" for a list of state statutes and Supreme Court rules, as well as examples of court decisions in states absent either.)

The U.S. Congress has also expressly authorized the use of *cy pres*. In Public Law 109–2, §1712—Feb. 18, 2005 ("The Class Action Fairness Act" ("CAFA")) Congress included the following language as part of §1712(e): "The court, in its discretion, may also require

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[2] Although *Nelson* is unpublished and not binding precedent, it "may be cited as persuasive authority." 11th Cir. Rule 36-2.

that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."

Thus, whether promoted by statute, court rules, or court precedent, the use of *cy pres* has become well-established throughout American jurisprudence. The reason is simple. It allows for an effective distribution of residual funds to non-profit entities that when distributed appropriately represent people who are similarly-situated on the whole to the members of the class. This serves to preserve the deterrent effect of class actions, while allowing courts to authorize the distribution of residual funds.

II. *Cy Pres* Awards Are Legal and Constitutional

Petitioners and certain *amici* offer a panoply of reasons, both constitutional and otherwise, as to why this Court should eliminate *cy pres* distributions. For the most part, the intellectual underpinning for these challenges is a law review article written by Professor Martin H. Redish: Redish, Julian & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). *See* Pet. *passim*; Brief of CATO Institute and Americans for Prosperity ("CATO") 12; Brief of Center for Constitutional Jurisprudence and the Atlantic Legal Foundation ("CCJ") 8; Brief of Chamber of Commerce of the United States of America ("Chamber") 5,13,20; Brief of Lawyers for Civil Justice ("LCJ")

13,16,20; Brief of United States ("SG") 16-17,20; Brief of the Attorneys General ("AG") 10-11; Brief of Manhattan Institute for Policy Research ("Manhattan") 14,17; Brief of New Jersey Civil Justice Institute ("NJCJI") *passim*. Meanwhile, for case support, heavy reliance is placed upon *dicta* in 3 cases where the courts *actually approved* the use of *cy pres:* the concurrence in *Klier*, 658 F.3d at 474,480-481, cited by Pet. 17,33,37,50, LCJ 13,16,19, SG 17,18,26,27,32, AG *passim*, Manhattan 14, NJCJI 10,11,13; *In re Baby Prods.*, 708 F.3d 163, cited by Pet. 37,51, Chamber 20, LCJ 21, SG 18,19,28,30, AG 5,7,14; and *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir.2004), cited by Pet. 33, CATO 12-13,22, Chamber 25, AG 14, NJCJI 5,7,15, LCJ 13,16,21, SG 17,19,20,24.

A. The Challenge to *Cy Pres* Based upon Article III Misapprehends the Requirements of Standing

One argument advanced is that *cy pres* is really a court-imposed payment of unclaimed class funds from private litigants to a party whose rights are not at issue in the lawsuit. The redistribution of unclaimed funds to charities allegedly then transforms the adversarial two-party judicial process into an unconstitutional trilateral process. CCJ 6; LCJ 14-18. In essence, the position is that *cy pres* recipients have no standing and therefore the requirements of U. S. Constitution, Article III, §2 cannot be met.

However, this ignores the fact that *cy pres*, as will be discussed below, does constitute relief to the class, making it incorrect to say that there is no redressability due to an alleged absence of relief. Moreover, arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what *actually* happens in class action settlements. In order to resolve class action litigation, district courts must first approve any proposed settlement as well as any distribution proposed by class counsel on behalf of the class representative(s). Thus, a court tasked with approving the distribution of any residual funds must first evaluate the settlement proposal that resolves the dispute.[3] Until that approval occurs, the only parties with standing before the court are the adversarial parties, i.e., the class representative(s) and settling defendant(s).

Although a court may be free to elicit information from a prospective recipient, only after this approval does a *cy pres* recipient obtain any interest in any funds, the same way proposed recipients are treated under charitable trust law.[4] Once this interest is

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[3] *See generally* F.R.C.P. 23; Manual for Complex Litigation, Fourth §13.1 at 167–182 ("Manual"); Newberg §10:16; *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682,689 (7th Cir.2013) (remanding district court's order of *cy pres* award as premature, but stating "[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied," including potentially ordering a *cy pres* distribution).

[4] In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. *See, e.g., In re Trustco Bank*, 929 N.Y.S.2d 707,711 (N.Y. Sup.Ct. 2011) ("[T]he issue of

established, *cy pres* recipients may then participate in court actions as of right. At this point, *cy pres* recipients have standing to assert or defend their claims to the funds which in turn satisfies Article III's case-or-controversy requirement. Afterwards, just as in the charitable trust setting, once the *cy pres* recipient accepts the funds, the recipient comes under the court's jurisdiction.

The other case-or-controversy argument raised is an attack on the underlying "standing" of the class itself to have brought the action in the event that there is a "*cy pres* only" settlement. *See* CCJ 3. The assertion is that if the class members receive no direct relief, the lawsuit could not have had standing, because there could not have been a "case or controversy." However, this analysis is based upon fallacious *post hoc ergo propter hoc* reasoning. Under Rule 23, the party seeking certification must have first satisfied Rule 23(a)(1)-(a)(4), which requires the putative class to meet numerosity, commonality, typicality, and adequacy of representation criteria and, as all other litigants, standing.[5] Whether or not class members actually

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standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated.").

[5] S.G. at 23 conditions standing on whether *cy pres* distributions demonstrate "redressability," advancing a rule requiring the remediation of a "continuing violation" that caused the injury or "the imminence of a future violation" that would inflict the same injury. However, this has nothing to do with Article III standing

succeed in recovering monetary damages has nothing to do with standing or one could argue that every plaintiff who brings a lawsuit unsuccessfully did not have standing *ab initio*.

B. The Rules Enabling Act Does Not Prevent *Cy Pres* Distributions

Another contention is that a court imposed payment of unclaimed settlement funds from a defendant to a third party *cy pres* recipient transforms the class members' private cause of action into a civil fine. As a result, a class is ostensibly granted more rights than its members would have had if they had filed individual lawsuits. This is because, under substantive laws that only permit recovery of compensatory damages for the class, a civil fine cannot be authorized. AG 10; LCJ 6,19; Manhattan 16-17.

Courts have uniformly rejected this argument. In enacting Rule 23, it was Congress that approved of the aggregation of private causes of action in class actions to allow plaintiffs to recover compensatory damages on a collective basis. A class action lawsuit, therefore, does not abridge, enlarge, or modify the substantive right to bring such a collective action nor afterwards to settle the lawsuit. The *cy pres* distribution itself becomes only one part of the administrative

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but really is only an argument regarding what factors should be considered by the court in approving *cy pres* recipients.

function of distributing the settlement proceeds.[6] As the Third Circuit noted:

> Because "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action," we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.

In re Baby Prods., 708 F.3d at 173 n.8 (citation and quotations omitted). This is in accord with ALI Principles §3.07 cmt. a, which both respect the Rules Enabling Act and conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.

C. Any First Amendment Concern Lacks Merit

Petitioners argue that when class representatives agree to give *cy pres* funds to charitable entities, individual absent class members have no control over which charitable organization will receive the funds. Therefore, when settlement funds are directed

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[6] This administrative function is one basis for the court's power to approve *cy pres*. A second basis is the court's general equitable powers. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir.1989) (treating *cy pres* distribution as a matter of the federal court's inherent equitable discretion). Finally, there are statutory powers, granted by 23 states and the U.S. Congress as part of CAFA.

to non-profit entities, absent class members may be forced to support organizations with which they may not agree in violation of the First Amendment's prohibition on compelled speech. In essence, they argue this would implicate the Court's proscription against compelled speech, as articulated in *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448,2464 (2018) and *Knox v. SEIU*, 567 U.S. 298,309 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups."). Pet. 12,17; CCJ 3; LCJ 7,22; CATO 29-31; Center for Individual Rights ("CIR") 3.

The advocates of this argument skirt over the fact that absent class members would already have been given notice of their right not to participate in the case at all, and, therefore, ultimately its settlement, by opting out of the class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. . . ."). As was correctly recognized by the district court below, Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122,1128 (N.D. Cal.2015). Class notice must state: the nature of the action; the definition of the class; the claims, issues, or defenses asserted; the right of a class member to enter an appearance through an attorney;

and the right to have the court exclude the individual from the class, as well as the time and manner for requesting that exclusion. The notice must also inform class members that they will be subject to "the binding effect of a class judgment" and, if they do not exercise their opt-out right, they will be bound by the judgment. F.R.C.P. 23(c)(2)(B).

In failing to opt out, absent class members consent to the representative plaintiff(s) approved by the court acting on behalf of their interests. This includes entering into a settlement and subsequently, if necessary, the designation of *cy pres* recipients. It is settled law that "not every potential disagreement between a class representative and the class members will stand in the way of a class suit." 1 Newberg §3:26. Rather, "only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. . . ." 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* §1768 (3d ed. 2005).

Petitioners challenge this single "opt-out" right as insufficient. Pet. 36-37; *see* CIR 6-7. They argue that the single opt-out right is akin to the illusory rights articulated in *Janus* and *Knox* where this Court found that the funding of political activities was forced in violation of the First Amendment. However, those who fail to opt out of a class action are specifically given notice that they will become members of the class. This is not illusory but rather the result of a Congressional mandate that absent class members be given a right to opt out after receiving the required notice and that, if

they don't, they will become actual "members" of the class represented by the designated class representative. Thus, *Janus* and *Knox* are inapplicable.

Nevertheless, CATO 31 argues that "an opt-in mechanism is needed because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights." However, if Congress wished to require an opt-in requirement as part of Rule 23(b)(3), it would have done so. Instead, it was the judgment of Congress that only a single opt-out right is necessary before one becomes a class member. To be sure, Congress has given the courts a discretionary right to order a second notice and opportunity to opt out. F.R.C.P. 23(e)(4). Even here, though, Congress elected to leave this up to the discretion of the trial court and not make it mandatory. And courts have consistently ruled that the lack of a second right to opt out does not violate due process. *Low v. Trump Univ., LLC*, 881 F.3d 1111,1121 (9th Cir.2018); *see also Denney v. Deutsche Bank AG*, 443 F.3d 253,271 (2d Cir.2006). In essence, in demanding mandatory opt-in or second opt-out rights, *amici* are requesting a reversal of seventy years of this Court's precedents regarding "notice" and the right to opt out, as well as a finding that Congress has violated the Constitution in enacting Rule 23.

This is not to say that absent class members lose their ability to further challenge the designation of a *cy pres* recipient with which they do not agree. Absent class members have the remaining safeguard that a class action can only be maintained if, among other things, "the representative parties will fairly and

adequately protect the interests of the class" as a whole. F.R.C.P. 23(a)(4). If absent class members believe this has not occurred, they may still object as part of the proceedings required by F.R.C.P. 23(e)(5). Indeed, no class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the class to be bound by the settlement. F.R.C.P. 23(e)(1)(B). Then, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." F.R.C.P. 23(e)(2).

D. The Existing Rules Are Sufficient to Address Petitioner's Concern About Conflicts of Interest and Scandalous Behavior

Inherent in any action, including class actions, is the potential for conflicts of interest and less than ethical behavior by litigants, counsel, or even the courts. In a final attack on the concept of *cy pres*, Petitioner and certain *amici* conjecture about a litany of alleged problems, spinning a lurid tale of ubiquitous corruption on the part of both class counsel and defendants, along with defense counsel.

The most common allegation is that class action litigation is rife with unscrupulous class counsel who have "commandeered" the claims of class members, CATO 16, and are notoriously only concerned about their fees while disregarding the interests of the class. Pet. 7,16, AG 5, CATO 11-12. According to this

argument, to maximize their fees, counsel "game" settlements, Pet. 20-21, in several ways, including: 1) lowering the settlement value by "accept[ing] bargains that are worse for the class if their [fee] share is sufficiently increased," Pet. 22; or 2) inflating the settlement through the use of *cy pres* in order to get defendants to pay more money and hence increase their fees when awarded on a percentage basis. S.G. 19; A.G. 5; Chamber 16. Yet, Petitioner acknowledges that "both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement." Pet. 22. And no examples are provided where a defendant was incentivized to pay *more* money than it had to.

These allegations also tend to ignore the way fees are generally requested. As a rule, fees are either based upon hours worked, a percentage of the total payment made by the defendant, or both. Manual §14.121-122. Often these are negotiated separately with the defendant and presented to the court as a separate request for approval. *Id.*, 14.22. At times, fees are contested by defendants, even though the underlying settlement is agreed to. *Id.*, 14.23. While, as in any contingent matter, a total fee earned might be higher as the recovery goes up, the final percentage paid or hours accepted always rests with the discretion of the court. *Id.* As a result, whether based upon hours worked or contingency, there is never a fee-driven incentive to get less money in settlement.

There are four other reasons Petitioner gives to demonstrate that *cy pres* is problematic: 1) *cy pres* leads cases to be brought that have little or no merit

for the single goal of forcing litigation-based cost-driven settlements, Pet. 20-21; 2) class counsel intentionally define classes to have a vast membership in order to achieve a "*cy pres* only" settlement, Pet. 49; 3) *cy pres* recipients are selected in order to force judicial recusal, Pet. 38; and 4) defendants use *cy pres* to hide their misconduct from their customers, because customers will not notice *cy pres* distributions, Pet. 32.

Petitioner's musings are not in accord with actual practice. First, there are significant expenses and high transaction costs for any counsel bringing a class action, engaging in discovery, moving for class certification, or facing an F.R.C.P. 23(f) appeal; given this, betting on a *de minimus* and possibly ephemeral settlement rarely, if ever, justifies advancing the necessary labor and costs. *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340,341 (1978) (General rule is representative plaintiff should bear costs relating to sending notice). Second, at the time of settlement it is much too late to artificially inflate the size of a class in order to foster a "*cy pres* only" distribution, because "numerosity" has to be made clear at the time of class certification in order to comply with F.R.C.P. 23(a)(1) and informed notice must already have been given to all putative class members. Third, by the time *cy pres* is considered, the parties generally have had long experience with the trial court and, as a rule, the court has approved the basic settlement; at this point, hoping for a rare discretionary Federal judge recusal makes little sense. As to Petitioners' fourth alleged conflict, defendant's conduct would already have been

subject to a widespread opt-out notice, often attendant media coverage, and then widespread notice of a settlement; after these, there is little left to hide from class members.

Perhaps without intending to, Pet. 20 intimates correctly that the existing rules are sufficient to address self-dealing concerns: "But *in the absence of sufficient judicial scrutiny* under Rule 23(e). . . ." (emphasis supplied). Or, as is echoed by AG 3: "This type of arrangement is precisely why courts are tasked with policing the 'inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.](Citation omitted).'" Thus, tacitly acknowledged but lost in all of the hyperbole is the fact that Congress has put in place several safeguards for absent class members. In evaluating the settlement of a class action, the district court has akin to a fiduciary duty to absent class members who were not party to the settlement agreement. *See* F.R.C.P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277,279–80 (7th Cir.2002) (district judges must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions"). This is why settlements of class actions in all jurisdictions require judicial approval before they can become effective. The issue then is not the rules themselves, but rather the consistency and vigilance of judicial oversight in scrutinizing and, as required, preventing abuses.

Most other settlements of civil cases involving adults do not require judicial review before approval.

The task of a district court under Rule 23(e) is to assess whether the proposed settlement is "fair, reasonable and adequate." F.R.C.P. 23(e)(1)(C). "Reasonable" implies that the settlement should be a product of considered judgment and not arbitrary. "Adequate" implies that the settlement should provide relief to the class sufficient in magnitude and rationally related to the harm alleged. "Fair" implies that the settlement should not discriminate between similarly situated class members, and also suggests that the bargaining process must be at arm's length. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir.1991); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96,116 (2d Cir.2005); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277,279 (7th Cir.2002) (that the settlement not be the "product of collusion"); *see also Carson v. American Brands, Inc.*, 450 U.S. 78,88 n.14 (1981) ("judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement"). The Manual §21.62 contains a 13-part list of items to consider.

Moreover, in undertaking this review, even greater scrutiny tends to be given under certain circumstances. These include where there is little or no distribution to the class, Manual §21.61, at 309-310, attorneys' fees are high, or when unclaimed funds revert to the defendant whose conduct resulted in the settlement. In fact, in the Ninth Circuit, class action settlements in which the settlement agreement is negotiated prior to formal class certification require "an

even higher level of scrutiny." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,946 (9th Cir.2011); Newberg §11:27.

Finally, it is likely that before the Court generates an opinion in this case, the amended Rule 23(e)(2)(C)(ii) (effective Dec. 1, 2018) will be law. Recently approved, it adds language specifically requiring the trial court to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

III. Guidance to Consider in Evaluating the Distribution of *Cy Pres*

In *Marek v. Lane*, 571 U.S. 1003 (2013), Chief Justice Roberts' concurring opinion listed a number of questions related to the use of *cy pres* that the Court has never addressed. CJRI believes that the rules, as now amended, are sufficient to address many of these concerns when courts diligently review *cy pres* proposals. However, if this court is intending to provide guidance to the courts below, CJRI makes the following suggestions.

A. Distributing Settlement Funds to Class Members Should Always Be the First Priority

Cy pres awards should not be used when the funds recovered from the defendants can be effectively delivered to class members. Courts should scrutinize these

closely, which indeed numerous federal courts have done. Examples include: the Second Circuit in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423,434-436 (2d Cir.2007) (noting it appeared the district court was not aware that it could allocate excess funds to class members as treble damages); and the Seventh Circuit in *Pearson v. NBTY*, No.11-07972, Dkt. 213-1 ¶¶7-8 (N.D. Ill. May 14, 2015) (renegotiated *cy pres* to give class members $4 million more).

These examples are the exception rather than the rule. Still, consistent with these, CJRI believes that when money from a settlement can be economically and reasonably distributed to class members, that should always be the first priority. If this can be done by crediting a class member's credit card, bank account, cell phone or other accounts, it should be. If this is not possible, but class members can be sent checks, this should constitute an acceptable method of distribution provided the transaction costs are not greater than the settlement.

On the other hand, virtually all Circuits have correctly recognized that distribution to class members should not result in a windfall to members who have submitted claims and already been fully compensated. *In re Lupron*, 677 F.3d 21,35 (1st Cir.2012); *Klier*, 658 F.3d at 475. *See* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361,393 (1999).

B. Factors to Be Considered in the Selection of *Cy Pres* Recipients

Despite the fact that class members should always be the primary recipients of settlements, at times settlements will inevitably result in funds that cannot be reasonably distributed. It is for this reason that all Circuits and the vast majority of state court systems have concluded that *cy pres* distributions are necessary.

While reversion to the defendant has been suggested as an alternative to *cy pres*, this has been roundly rejected. Such reversions play havoc with the deterrent function of class action settlements. *In re Lupron*, 677 F.3d at 32-33; *In re Baby Prods.*, 708 F.3d at 172; *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,35 (1st Cir.2009); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330,1355 (S.D. Fla.2011) (one of the most important functions of the class action device in small-stakes cases is the "deterrence of wrongdoing"). *See* Pet. 6.

The question then is what should be considered by the court in approving *cy pres*. After finding that *cy pres* is necessary, most courts have concluded that *cy pres* should be distributed so that it indirectly benefits the class, consistent with the goals of the underlying case. To this end, courts have rejected proposed *cy pres* distributions which have had no relationship to the underlying case. *In re Airline Ticket Comm'n*, 268 F.3d 619,626 (8th Cir.2001) and *In re Airline Ticket Comm'n*, 307 F.3d 679,683-684 (8th Cir.2002) (*cy pres* recipients should have as close as possible relationship

to the class action suit and reflect the geographic scope of the class).

The Ninth Circuit similarly rejected a number of proposed *cy pres* distributions. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,1307–09 (9th Cir.1990) (rejection of non-earmarked *cy pres* to humanitarian organization in Mexico where Mexican farm workers sued for violation of Farm Labor Contractor Registration Act); *Nachshin v. AOL, LLC*, 663 F.3d 1034,1040-1041 (9th Cir.2011) (rejection of award to local non-profits with "no apparent relation to the objectives of the underlying statutes, and it is not clear how this organization would benefit the plaintiff class" in case involving internet subscribers receiving wrongfully inserted advertisements in email messages where the court noted that proper *cy pres* recipients would be "organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance"); *Dennis v. Kellogg Co.*, 697 F.3d 858,867 (9th Cir.2012) (rejection of *cy pres* to organizations that feed the poor where allegation was that Kellogg falsely advertised that its cereal improved children's attentiveness with Ninth Circuit holding that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising").

The S.G. at 24-25 seemingly requests an affirmative requirement that the distribution must specifically either encourage the recipient to discontinue the current problematic practices of the defendant or deter

the defendant from committing similar future ones. CJRI agrees that recipients who in no way address the practices of concern or deter such practices in the future are generally inappropriate for *cy pres* distribution. However, it would be difficult to parse out at exactly which point the fit between the mission of the *cy pres* entity and the conduct at issue would be sufficient for the S.G.'s proposed standard. Indeed, ALI Principles, *supra* note 3, §3.07(c) appropriately cautions that while *cy pres* recipients should be those "whose interests reasonably approximate those being pursued by the class," there are times when no such recipients exist and still "a court may approve a recipient that does not reasonably approximate the interests of the class." The reason for this is that if too narrowly limited, the scope of the appropriate *cy pres* recipients to the precise claims in the class action may not always be possible or practical and this may unnecessarily complicate the socially desirable settlement of large class action disputes.

In determining whether a *cy pres* remedy is appropriately tailored to the class, CJRI believes that courts should consider the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class. *See, e.g., In re Holocaust Victim Assets Litigation*, 424 F.3d 132,147 (2d Cir.2005); *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060,1067 (8th Cir.2015), quoting ALI Principles §3.07 cmt. b; *In re*

Airline Ticket Commission, 268 F.3d at 626; *Lane v. Facebook, Inc.*, 696 F.3d 811,819-820 (9th Cir.2012); *Nachshin*, 663 F.3d at 1038; *In re Polyurethane Foam*, 178 F. Supp. 3d at 625; *In re Lupron*, 677 F.3d at 33. Of course, some of these factors may not apply in all cases. However, in their review, courts should always be cognizant of the need to find a *cy pres* recipient that will advance the overall purpose of the class action.

C. Making the Initial Selection of *Cy Pres* Recipients

1. The Defendant Should Not Select *Cy Pres* Recipients

As a rule, defendants should not make the selection of *cy pres* recipients. There are several reasons for this. First, one thing that class members must have in common is an injury caused by the defendant. F.R.C. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,1432 (2013). Indeed, implied in any settlement is that a defendant admits that the victims have some legal right to restitution. The result of a successful trial or settlement should be a transfer of wealth from perpetrator to victim, not one that circles the money back to the defendant. *See* CATO 32-33.

Just as a reversion to a defendant is inappropriate, class members should not be compelled to return hard won compensation to the surrogates for the party that injured them or to beneficiaries of their selection. Certainly, the money paid due to a defendant's misconduct should not be used to burnish the public-relations

image of a defendant that inflicted the damage giving rise to the lawsuit. *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402,415 (S.D.N.Y.2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs" when "defendants reap goodwill from the donation of monies"). If *cy pres* funds are at all controlled by defendants, the improper result would be that class members will be forced to indirectly support those who caused their injuries, substantially diminishing any deterrent effect of the case's resolution. *See* CATO 19; S.G. 19-20.

CJRI believes that *cy pres* awards designated for organizations that have previously received substantial payments from a named defendant should be looked at closely by the reviewing court. This would be particularly true where the *cy pres* award does not increase the overall contribution by the defendant to the entity in question. *Dennis*, 697 F.3d at 867-68 (raising concerns about a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway). While in some cases the selected entities might be the most appropriate recipients, the *cy pres* distribution may also appear to be nothing more than part of the continuous funding by the defendant of the entity in question which makes the court's careful review necessary.

2. The Court Should Not Have a Role in the Initial Selection of *Cy Pres* Recipients; Its Role Should Be the Close, Independent Scrutiny of Proposed Recipients

While there is a strong impetus for courts to select *cy pres* recipients, doing so is problematic because even when the motives underlying the selection are proper, it nevertheless creates the appearance of impropriety. *See Nachshin v. AOL, LLC*, 663 F.3d 1034,1041 (9th Cir.2011) (providing money to a legal aid foundation that though normally a proper choice for *cy pres* was heavily criticized, because the judge's husband sat on the board); *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving *cy pres* award to the presiding judge's *alma mater*).

Therefore, CJRI believes that it is best if the court does not involve itself in the initial process of selecting *cy pres* recipients. "The specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039; *see also In re Lupron*, 677 F.3d at 38 (affirming, but expressing concern, where the district court, not the parties, chose the *cy pres* recipient); *In re Baby Prods.*, 708 F.3d at 180 n.16 (not reaching the issue, but stating: "we join other courts and commentators in expressing our concern with district courts selecting *cy pres* recipients"). *See* Pet. 37.

Not only does permitting courts to choose the *cy pres* recipient create an appearance of (or actual) impropriety, more importantly it inevitably makes it difficult for the court to properly perform its critical review function over the appropriateness of the distribution. Courts need to make a completely independent determination that is not only based on objective criteria but is without any stigma. Afterwards, a court has a continuing obligation to monitor the disbursal of the class's funds. It is incumbent upon courts to take a hard look at *cy pres* beneficiaries, as well as whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to proposed *cy pres* recipients. Such an analysis is not unduly burdensome or challenging for the court, but a court may be compromised (or appear to be compromised) when the court itself is making the selection.

3. The Initial Selection of *Cy Pres* Recipients Should Be Undertaken by the Class Representative and Class Counsel

CATO argues that upon judgment or settlement each member of the class is vested with an individual property right. CATO 6. This is incorrect. To give each member an individually vested right would make settlements impossible to administer, as every settlement would have to be immediately apportioned and the individual's allocated funds placed into escrow. It also would play havoc with the fundamental purpose of the

class action device. *Califano v. Yamasaki*, 442 U.S. 682,700-701 (1979) ("[T]he Rule 23 class-action device was designated to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."). Instead, it is "efficiency and economy of litigation [that] . . . is a principal purpose of the [Rule 23] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538,553 (1974); accord *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800,1806 (2018). As such, the property obtained immediately upon settlement is not vested individually but rather vested with the class as a whole.

As the settlement property belongs to the class, it should be the role of the class representative along with counsel to suggest the proper distribution of the class's funds. Class counsel has represented the class members throughout the litigation, and has an independent duty to ensure that any distribution, including that of *cy pres*, is proper. *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355,359 (S.D.N.Y.1999) ("Additionally, the distribution preference of class counsel is entitled to deference because class counsel are the only entities with a meaningful equitable stake in the remaining class funds."). Class representatives generally share this responsibility. *Eubank v. Pella Corp.*, 753 F.3d 718,723–24 (7th Cir.2014) (named plaintiffs have ethical obligations as fiduciaries to the class). Once selected by the class counsel and class representative, it becomes the court's obligation to subject the selection to close review. Ultimately, then, it is the court that has the duty to ensure that class counsel and the class

representative(s) have diligently and fairly assessed the need for *cy pres* and then properly chosen the *cy pres* recipient(s).[7]

D. Proper Beneficiaries for the Distribution of *Cy Pres* Funds

"Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms." Pet. 20, citing *Amchem Prods. v. Windsor*, 521 U.S. 591,617 (1997). This is particularly true when claims involve only small individual recoveries where the transaction costs for individual litigants are too high to pursue the claim or for counsel to take on the representation. Thus, at their core, the fundamental purpose of every class action is to provide access to justice for people who on their own would not realistically be able to obtain the protections of the judicial system.

Given that the class action device provides litigants access to justice that they would not otherwise have, the use of *cy pres* awards to organizations that make as their mission providing such access has been

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[7] CATO 20 argues that counsel may subvert the process, citing a single case where it contends a *cy pres* recipient was chosen to influence the court. *Fairchild v. AOL, LLC*, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009). Yet, this possibility occurs in all litigation, and it becomes, here as elsewhere, the responsibility of appellate courts to ferret out.

viewed as a perfect fit.[8] *See, e.g., Lessard v. City of Allen Park*, 470 F. Supp. 2d 781,783-84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (Citation omitted)). Legal aid and access to justice organizations with objectives directly related to the underlying statutes or claims at issue in relevant class actions are, therefore, very appropriate *cy pres* recipients.

This is not to say that *cy pres* even to such organizations should be haphazardly given. In national class actions, *cy pres* recipients should have a nationwide scope. *Cy pres* from settlements related to consumer fraud, securities violations, or discrimination, for example, should go to organizations that assist similarly-situated individuals who have been subjected to such fraud, violations, or discrimination or may be in the future. Finally, cy *pres* should generally not go to newly

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[8] Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, Fed. Law, July 2010, at 26,27; Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12 (2009); Arthur H. Bryant, "*Cy Pres* Awards Don't Have to Be Complicated," The National Law Journal, February 9, 2015; Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 La. B.J. 248,251 (2011); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267,291 (2014).

created organizations—even if there is a "fit"—absent a compelling reason, because such organizations will not have the necessary track record of performance the court needs to evaluate before approving the *cy pres* distribution.

But on the whole, federal and state courts throughout the country have appropriately recognized organizations that provide access to justice for underserved and disadvantaged populations as proper beneficiaries of *cy pres*. This need is widespread. As local, state, federal, and private funding dries up, *cy pres* has become the lifeblood for many organizations that provide many individuals vehicles for any access to justice.

E. There Is a Need for "*Cy Pres* Only" Settlements

Beyond *cy pres* generally, Petitioner and a number of *amici* take particular umbrage with the concept of what they describe as "*cy pres* only" settlements. These are described as unprofitable "strike suits" only brought in order to shake down a settlement with no intention of ever disbursing money to class members. Pet. 35. Any time that it is viewed as not feasible to provide monetary compensation to class members, they assert that one can conclude the lawsuit's only goal was to provide fees for attorneys. Pet. 53-54. CATO even suggests class counsel may agree to a *de minimus* recovery for the purpose of requiring a *cy pres* settlement. CATO 23.

Petitioner and certain *amici's* argument make the flawed assumption that at the time of the initiation of lawsuits that result in "*cy pres* only" settlements, plaintiffs are sufficiently perspicacious to know that the eventual settlement of the litigation will make it infeasible to distribute it to class members. While invariably defendants must argue that they have no liability and will never enter into a settlement, most settlements fall somewhere on a continuum. Settlements as a rule come after a significant amount of information about the action is discovered, either formally or informally. At times, even with ardent discovery the result is a settlement where the costs of distribution to the class do not warrant individual recoveries. Under these circumstances it would be foolish to require the parties to continue to litigate or try the case until the defendant wins or the class gains a recovery sufficient for individual distribution. This would impede the strong public policy of resolving litigation.[9]

Moreover, it is wrong to conclude that "*cy pres* only" settlements provide no benefit to class members. When companies or institutions cheat, harm, take advantage of or discriminate against large numbers of people, class actions are often the only way that those aggrieved can hold the responsible party accountable

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[9] What is often described as the very first *cy pres* settlement was a "*cy pres* only" settlement, *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974) (concluding that the modest size of the settlement fund and the large number of outstanding shares rendered payment unviable).

or lessen the benefits received from its bad conduct. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326,339 (1980) ("[A]ggrieved persons may be without any effective redress unless they may employ the class-action device."). This does not always require a tangible monetary award. Injunctive relief alone at times can provide an actual benefit to class members. *See In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Prods. Liab. Litig.*, No. MDL 2672, 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016) (replacement or repair for class member vehicles). Even absent effective injunctive relief and a pure "*cy pres* only" settlement, Petitioners' proposed remedy of essentially a dismissal of the action without any payment is the worst of all possible worlds for aggrieved class members. *See Mirfasihi*, 356 F.3d at 784 (*cy pres* awards prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment").

CONCLUSION

For the foregoing reasons, *amicus curiae* Civil Justice Research Initiative supports Respondents in their request that this Court approve of both *cy pres* awards generally and "*cy pres* only" settlements specifically.

Respectfully submitted,

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